Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From The Supreme Court of California

BRIEF AMICUS CURIAE ON BEHALF OF THE CALIFORNIA FOREST PROTECTIVE ASSOCIATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The California Forest Protective Association ("CFPA") is a non-profit, membership corporation which represents the owners of more than 4,000,000 acres, or approximately 50 percent, of the privately-owned commercial forest lands in the State of California. Its members are actively engaged in all aspects of forest management and the production of wood products.

This brief is submitted by CFPA pursuant to Rule 42 in support of the appellants. CFPA believes that the decision of the lower court, if allowed to stand, will substantially deprive the owners of private timberlands (and possibly others who operate in intensively regulated industries) of any effective means of redressing excessive government regulations.

STATEMENT OF THE CASE

In *Agins* v. *City of Tiburon,* 24 Cal. 3d 266 (1979), the California Supreme Court ruled that landowners may not claim damages for inverse condemnation of their property based upon the excessive use of the police power by a governmental entity. Donald and Bonnie Agins were the owners of five unimproved acres of land in the City of Tiburon. After aborting proceedings to acquire the property by eminent domain, the City enacted a zoning ordinance which restricted the use of the Agins' property to low density residential housing, open space uses, accessory buildings and related uses. The Agins then commenced suit charging that the ordinance constituted a de facto taking of their property by inverse condemnation for which they sought substantial damages. They also sought to establish the ordinance's unconstitutionality as a taking without payment of just compensation. On appeal of the dismissal of their complaint, the California Supreme Court held that the aggrieved landowners' sole remedy was to seek to

invalidate the excessive regulation. The court then found that the Agins had also failed to state a claim for declaratory relief.

The only justification offered by the court to support its unprecedented ruling in eliminating inverse condemnation damage actions was that such suits represented an unacceptable financial threat to far-reaching and innovative land use planning by governmental entities. It was the majority's view that this type of planning is socially desirable and must therefore be encouraged (albeit at the expense of the owners of private property). Even a cursory review of the opinion confirms that the decision rests not on legal precedent or analysis but rather only on the perceived social policy considerations of six of the seven justices of the California Supreme Court.

ARGUMENT

Invalidation is an Inadequate Remedy to Cure Regulatory Excesses.

The appellants' brief and those of the other amici supporting appellants have ably demonstrated that the California Supreme Court erred in its ruling and that the decision should be reversed. CFPA does not propose, therefore, to address all of the constitutional questions presented in this case. Rather, CFPA will discuss only the question of whether, considered within the context of the regulatory scheme applicable to its industry, invalidation provides an adequate remedy by which timberland owners can obtain relief from excessive regulation. CFPA submits that, for the reasons set forth below, it clearly does not.

The *Agins* case involved a relatively uncomplex regulatory scheme where the landowners were forced to evaluate the impact on their property, and hence the legality, of only *one* governmental action. Having decided that the zoning ordinance constituted a de facto taking of their property, they were

required to initiate only *one* legal challenge against *one* governmental entity in order to attack the ordinance.

In depriving the Agins of the right to obtain damages for inverse condemnation, the California Supreme Court was purportedly leaving them with a remedy by which they could fully vindicate their rights. The court failed, however, to even acknowledge any of the more obvious difficulties that the Agins would encounter with the invalidation remedy—*e.g.*, undue delay and expense, the possible need to launch repeated legal attacks against successive invalid regulations, the inducement to regulatory overzealousness resulting from the removal of financial risk. This failure serves to underscore the inherent weaknesses in the court's reasoning.

These same difficulties that the Agins would face with the invalidation remedy will also be experienced, but on a much more compounded and magnified basis, by other landowners whose land use activities are subject to a maze of intensive regulatory controls administered by a host of regulatory agencies. The timber industry operates in such a regulatory environment.

In California, timber operations are conducted under a complex network of environmental laws, ordinances and rules promulgated and administered by no less than 14 federal, state and local agencies. The principal regulatory agencies and their primary areas of jurisdiction are listed in Schedule I.

An approved timber harvest plan must be obtained from the appropriate governmental authorities before any timber operation may be commenced. As many as 2,400 plans are filed in California annually, each pertaining to proposed harvesting and reforestation operations on small, dispersed timberland areas throughout the State. Each of the various regulatory agencies, exercising concurrent (and often overlapping and conflicting) jurisdiction, imposes its own set of restrictions and prohibitions. Moreover, to address specific conditions encountered in the woods, the regulators are often

vested with substantial discretionary authority to impose additional controls far exceeding those contained in any published rules and regulations. In some cases, this discretionary authority even includes the power to veto the proposed activity.

As the property owner emerges from the plan approval process, he or she is confronted with the task of assessing the impact of a multitude of restrictions and controls on the proposed operation. The timber harvest plan may have been burdened with excessive regulations by one agency or by many. Alternatively, it may be that none of the restrictions, considered independently, are excessive; yet taken together, it may be clear that the landowner has been deprived of all reasonable use of the property.*

To challenge the excessive regulations, the landowner might be forced to pursue his or her case against numerous governmental agencies before multiple tribunals, in either concurrent or successive actions. Even assuming the property owner is willing to pursue these lengthy and costly challenges, the reward for success may be fleeting and illusory. The prospect remains that he or she will be forced to repeatedly challenge the new restrictions that are enacted to replace those just invalidated. Under these circumstances, the invalidation remedy is not simply inadequate; it is no remedy at all.

CFPA believes that the balance between government regulation and the rights of property owners must be restored and maintained. The timber industry needs a stable environment in which to operate and some reasonable assurance that today's investments in forest lands can be realized after the many years it requires to grow the trees to maturity. It would be fiscal madness to continue to make such investments if the landowner, having had his or her property confiscated by

* By virtue of remote location, terrain, lack of access and uses of surrounding properties, timberlands generally are not suited for any other uses other than timber production or dedication to the public as wilderness.

regulation, has no remedy available to recoup his or her losses. CFPA submits that inverse condemnation, and not invalidation, can only provide that remedy.

CONCLUSION

For the foregoing reasons, it is urged that the ruling of the lower court be reversed.

Respectfully submitted,

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SCHEDULE I.

Principal Agencies with Regulatory Jurisdiction over Timber Operations on Private Forest Lands

Agency	General Area of Jurisdiction
Federal	
Environmental Protection Agency	Regulates activities affecting air and water quality standards
Department of Interior	Regulates activities on lands near national parks, national scenic areas, etc.
State of California	
Resources Agency	Regulates activities on Wild and Scenic Rivers; regulates use of herbicides and pesticides
Board of Forestry	Principal rule-making agency for regulating timber operations
Department of Forestry	Principal approval, inspection and enforcement agency for timber operations
State Water Resources Control Board	Principal rule-making agency for implementing federal and state water quality standards
Regional Water Quality Control Boards	Regulates activities affecting water quality
Department of Fish and Game	Principal regulatory agency for activities affecting wildlife, fish and other aquatic resources
Department of Mines and Geology	Regulates activities in geologically significant areas
Department of Parks and Recreation	Regulates activities affecting state park areas and historic, archaeological and Native American sites
California Coastal Zone Conservation Commission	Regulates activities in Coastal Zone
Air Resources Board	Regulates activities affecting air quality; implements federal and state air quality standards
Local	
County Boards of Supervisors	Regulates various activities connected with timber operations such as transportation, noise abatement, etc.
County Agricultural Commissions	Regulates use of herbicides and pesticides